IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 26 OF 1995

Shri Gopal Vishnu Gaude,
major, r/o Pissurlem,
Sattari, Goa, through his
Attorney Shri Vishnu Gopal
Gaude, age 47 years, r/o
House No. 369, Pissurlem,
Sattari, Goa. ... Appellant

versus

1. Shri Manikrau Amrutrao
   Prabhu Dessai

2. Shri Bacharam Manikrao
   Prabhu Dessai(since deceased)
   through legal representatives:
   (a) Mrs. Sulochana Bacharam
   Prabhu Dessai,
   (b) Shri Prataprao Bacharam
   Prabhu Dessai,
   (c) Smt. Pratiksha Prataprao
   Prabhu Dessai,
   (d) Shri Sambhajirao Bacharam
   Prabhu Dessai,
   (e) Smt. Sangita Sambhajirao
   Prabhu Dessai,
   (f) Shri Dhanajirao Bacharam
   Prabhu Dessai,
   (g) Smt. Nanarata Dhanajirao
   Prabhu Dessai
   (h)Shri Tanajirao Bacharam
   Prabhu Dessai,
   All major in age, residents of
   Gauthanwada, Sankhalim-Goa.

3. Shri Nanasaheb Annasaheb
   Prabhu Dessai

4. Shri Madhavrao Dattajirao
   Prabhu Dessai

5. Shri Daji Dessai

6. Shri Babu D. Dessai

   All major of age, residing at
   Gauthan, Sanquelim, Goa. ... Respondents

Mr. V. B. Nadkarni, Senior Advocate with Mr. R. Noronha, Advocate for the Appellant.

Mr. M. B. D'Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for Respondent Nos. 1, 3 to 6.

Mr. M. S. Sonak with Ms. Pooja Bharne, Advocates for Respondent No. 2.

CORAM : V. M. KANADE, J.

DATE : 24TH JUNE, 2005.

ORAL JUDGMENT

The Appellant is the Original Defendant. The Appellant has filed this Second Appeal challenging the Jugment and Order passed by the Civil Judge, Junior Division, Sattari at Valpoi, Goa, in Regular Civil Suit No.

63 of 1978 who was pleased to decree the suit filed by the Respondents which decree was confirmed by the Additional District Judge at Panaji by Judgment and Decree dated 17-12-1994. When the Second Appeal came up for admission on 4-7-1996, the learned Single Judge of this Court was pleased to admit this Second Appeal by framing two substantial questions of law, namely (1) Whether the documents relied upon by the parties have been misconstrued vis-a-vis identification of the suit property and (2) Whether the Courts did not address to the question of adverse possession with reference to the concept of possession under the Portuguese law which need not necessarily be to the knowledge of the owner?

2. The learned Counsel appearing on behalf of the Appellant has submitted that the description of the property in question which is given in the plaint filed by the Plaintiff and the description of the property mentioned in the title of documents relied upon by the Plaintiff are different. He has submitted that both the lower Courts have not discussed this issue though, it was specifically pleaded by the Appellant in his written statement. He has submitted that no issue on this point was framed by the trial Court though a composite issue regarding the question of title of the Plaintiff was framed. Neither the trial Court nor the lower Appellate Court have addressed themselves to this point which was specifically pleaded and argued.

3. The brief facts are that the Plaintiff filed a suit on 1-8-1978 being Regular Civil Suit No. 63/78 for a declaration that he is entitled for the possession of the property described in para 1 of the plaint, namely property known as "DONCOL" situated in village Pissurlem of Sattari Taluka surveyed under Old Cadastral Survey No.4 having boundaries described therein and for an order of perpetual injunction restraining the Appellant from disturbing his possession in respect of the suit property.

4. Before this suit was filed by the Respondents/Original Plaintiffs, the Appellant had lodged a complaint with the Executive Magistrate of Sattari Taluka in 1975 alleging that some Respondents had obstructed the Appellant and had tried to disturb his possession of the suit property known as "DONCOL" bearing survey no.4 of Pissurlem village of Sattari Taluka. In view of the complaint filed by the Appellant, the Executive Magistrate initiated proceedings under Section 145 of the Code of Criminal Procedure registered as Case No. 2 of 1975. On 24-12-1975, the Executive Magistrate held that the Appellant was in possession of the said coconut grove. The Appeal was preferred by the Appellant against the said Order and the Sessions Court remanded the matter to the Executive Magistrate to consider the matter afresh. In 1976, the Executive Magistrate passed an Order appointing the Talathi as a Court Receiver. It is alleged by the Appellant

that the Court Receiver did not take possession though this fact is disputed by the Respondents. In the meantime, on 1-8-1978, the Respondents filed a suit. Thereafter, the suit was decreed by the trial Court and the Judgment and Decree of the trial Court was confirmed by the appellate Court. The learned Counsel appearing on behalf of the Appellant has filed a Paper Book since certain documents filed in the trial Court were not annexed to the Paper Book which was prepared by the Appellant. The learned Counsel invited my attention to the evidence of P.W.2, Mahadevrao D. Dessai, after issues were framed and has pointed out that P.W.2, Mahadevrao D. Dessai, in his evidence has stated categorically that the description number of the property is 13185. He has also invited my attention to the document of title on which reliance was placed by the Plaintiff and the certificate which was issued has been mentioned and the description is 18135. The description given in this entry states that the property is bounded on the East by Doncol coconut grove and on the North, West and South by a stone wall. He has submitted that this does not correspond to the description of the property given in the plaint in para 1. Para 1 of the plaint reads as under:-

> "Para 1 - In the village Pissurlem in Sattari Taluka, there is a property known as "Doncol" which is surveyed under Old Cadastral Survey No.4 and bounded to the East by the property of heirs of Ramnath Naik, to the West by paddy field belonging to the Plaintiffs and Gasdas, to the

North by limit of village Onda and to the South by the property of Budkule".

5. He has, therefore, submitted that the property described in the suit and the description of the property which is given in the title documents on which reliance is placed by the Plaintiff are different. The Plaintiff is not entitled for a decree in terms of the description of the property mentioned in the plaint. He has further submitted that both the lower Courts have not considered this aspect of the matter though, it was pleaded and argued. He has invited my attention to the written arguments which were filed in the lower Appellate Court and has pointed out that in para 5 of the written arguments this ground was specifically raised before the lower Appellate Court. He has also invited my attention to the written statement filed by the present Appellant in which in para 2 it is specifically pleaded that the description of the property in para 1 of the plaint is not correct.

6. At this stage, when the learned Counsel appearing on behalf of the Respondents was called upon to answer this submission which was made by the learned Counsel appearing on behalf of the Appellant he invited my attention to the map of Old Cadastral Survey No. 4 which is found at page 91 of the Paper Book and he submitted that the property has

been properly described with a specific reference being given to Old Cadastral Survey No. 4 and submitted, therefore, that there was no ambiguity in respect of the description of the property. He further submitted that the certificate which was issued merely gives a description to the field property called "Doncola Molly" and it refers to a Doncola coconut grove on the East. He, therefore, submitted that there was no ambiguity and a specific reference is made on the coconut grove to the East. He further invited my attention to another entry which is made in respect of the said transaction where various properties owned by the Plaintiff have been described. He has also invited my attention to the description of the property No. 13193. He submitted that this property gave a reference of the coconut garden called "Doncola" situated at Pissurlem of parish of Bicholim, bounded on three sides by the coconut garden and on the fourth side by the stream of water. He has submitted that the said document, translation which is annexed to the Paper Book refers to the various properties which are owned by the Plaintiff. He has, therefore, submitted that substantially the description of the property has been given in the list of properties which are owned by the Plaintiff and, therefore, the Plaintiff has discharged the initial burden which is cast on him and both the lower Courts have given a finding of fact in respect of the description of the property and, therefore, there was no reason for this Court to interfere with the finding of the facts given by the lower Courts while exercising its

jurisdiction under Section 100 of the Civil Procedure Code. He has submitted that the suit was filed in 1978 and the case is pending for the last 27 years, therefore, the Appellant should not be permitted to raise this issue in the High Court on this ground. He has submitted that the Appellant was appointed as a watchman which fact has been established by the other witnesses and the Appellant does not have any evidence to show that he is the owner of the property or that he had obtained possession from the so-called Vagle, who according to him is a fictitious person.

7. The learned Counsel appearing on behalf of the Appellant in rejoinder has submitted that even a description as mentioned in 13193 does not tally with the description given in Old Cadastral No. 4 which is mentioned in para 1 of the plaint. He has further submitted that, therefore, neither the description given by P.W.2, Mahadevrao D. Dessai, of property No.13185 or property No.13193 matches with the description given in the plaint.

8. In my view, there is some substance made by the learned Counsel appearing on behalf of the Appellant and a specific issue has been framed by this Court while admitting this Second Appeal regarding the identification of the suit property vis-a-vis the documents which are relied upon by the parties. From a perusal of the Judgment of the trial Court as

also the appellate Court, it can be seen that though a specific plea regarding the identification of the suit property was raised by the Appellant/Original Defendant in his written statement a specific issue on this point was not framed. Assuming that a general issue was framed no specific finding has been recorded by the trial Court on this aspect. Similarly, though a specific ground was raised in the lower appellate Court, the lower appellate Court has also not considered this submission. The written arguments which were submitted in the lower appellate Court clearly reveal that in para 5 this issue was specifically raised. However, the appellate Court also has not given any finding on this aspect.

9. Considering the rival contentions in my view, it would be appropriate and in order to ensure that ends of justice are met, it would be proper to remand the matter to the lower appellate Court for deciding this issue after opportunity is given to both the parties, namely the Plaintiff and the Defendant to lead evidence on this point so that no prejudice is caused either to the Plaintiff or to the Defendant. It is no doubt true that much time has lapsed after the suit was filed and the possibility of availability of witnesses also has to be taken into consideration. However, since the question is regarding the description of the property mentioned in the suit and the description in the title deeds, if inadvertently the specific title deed is not produced by the Plaintiff he can produce the document.

The Defendant also is to be entitled to give any documentary evidence and other evidence so that the lower appellate Court can decide the issue. In my view, this issue will go to the root of the matter and unless the Plaintiff conclusively brings on record either documentary or oral evidence and proves his title in respect of the property described in the plaint, he would not be entitled to ask for a declaration of ownership and possession in respect of the suit land. In this view of the matter, the Judgment and Order of both the lower Courts is set aside. The matter is remanded to the Additional District Judge who is directed to frame an additional issue on the plea raised by the Defendant in the written statement regarding the identification of the suit property vis-a-vis the documents relied upon by the parties and allow both the parties to lead evidence on this point. It is clarified that the District Court may ask the trial Court or such other Court such as the adhoc Additional District Judge/Assistant Judge to record the evidence and after the process of recording of evidence is over send the recorded evidence to the District Court and thereafter decide the issue on merits and in accordance with law. The District Court is expected to complete this process within a period of six months and finally decide the Appeal on this issue and other issues which are raised by both the parties. It is further clarified that the Court recording the evidence will permit the

evidence to be recorded only on the new issue as per the guidelines given by this Court. The Appeal is allowed in the above terms.

V. M. KANADE, J.

RD.